

Before the Court are the Plaintiff's motion for partial summary judgment and motion for permanent injunction filed on July 31, 2009, and Defendant Missouri Valley Communications, Inc.'s motion for summary judgment filed on August 31, 2009. See Docket Nos. 29, 33, and 36. Defendant North Dakota Public Service Commission filed a response to the Plaintiff's motion on

August 31, 2009. See Docket No. 34. On October 5, 2009, the Plaintiff filed a consolidated reply brief and response to Defendant Missouri Valley Communications, Inc.’s motion. See Docket No. 48. On October 15, 2009, Defendant North Dakota Public Service Commission filed a consolidated “Reply to Missouri Valley’s Motion for Summary Judgment and Response to Midcontinent’s Opposition to Missouri Valley’s Motion for Summary Judgment.” See Docket No. 49. Defendant Missouri Valley Communications, Inc. filed a reply brief on October 16, 2009. See Docket No. 52. For the reasons set forth below, the Court denies the Plaintiff’s motions for partial summary judgment and permanent injunction, and the Court grants Defendant Missouri Valley Communications, Inc.’s motion for summary judgment.

I. BACKGROUND

The plaintiff, Midcontinent Communications (Midcontinent), is a South Dakota partnership with its principal place of business in Sioux Falls, South Dakota. Defendant North Dakota Public Service Commission (PSC) is a governmental body organized under the laws of North Dakota. Defendants Kevin Cramer, Tony Clark, and Brian Kalk are the three present commissioners of the PSC and reside in North Dakota. Defendant Missouri Valley Communications, Inc. (Missouri Valley) is a North Dakota corporation with its principal place of business in Scobey, Montana.

Midcontinent and Missouri Valley are telecommunications companies. Midcontinent claims rights to an interconnection with Missouri Valley’s facilities under the Telecommunications Act of 1996, 47 U.S.C. § 151, et seq. Missouri Valley claims it is exempt from interconnection obligations

pursuant to the rural exemption under the Telecommunications Act.¹ On February 8, 2008, Midcontinent commenced a proceeding before the PSC seeking a determination that Missouri Valley had waived its rural exemption or, in the alternative, that Missouri Valley's rural exemption should be terminated. On April 9, 2008, Missouri Valley filed an application with the PSC that requested a suspension of the requirements under the Telecommunications Act.

An administrative hearing was held before the PSC on July 9-10, 2008. On October 8, 2008, the PSC issued an order denying Midcontinent's request for the termination of Missouri Valley's rural exemption and finding Missouri Valley's application moot. See Docket No. 34-4. In a 2-1 decision, the PSC concluded that Midcontinent had failed to prove the prerequisites for termination of Missouri Valley's rural exemption. See Docket No. 34-4.

On December 3, 2008, the PSC denied Midcontinent's petition for rehearing. On April 8, 2009, Midcontinent brought this action in federal court claiming the Defendants violated 47 U.S.C. § 251 by not making interconnection available to Midcontinent. See Docket No. 1. Midcontinent requests that the Court enter a declaratory judgment finding that the PSC's Order is invalid and unenforceable as a matter of federal law, order the PSC and individual commissioners to suspend Missouri Valley's rural exemption as to Midcontinent immediately, issue a permanent injunction to prohibit the Defendants from taking any action to enforce the PSC's Order, order Missouri Valley to conclude an interconnection agreement with Midcontinent, and award Midcontinent damages, attorney's fees, and interest.

¹A more in-depth background of the case and the Telecommunications Act of 1996 can be found in the "Report and Recommendation re Motions to Dismiss." See Docket No. 46; see also Midcontinent Commc'ns v. N.D. Pub. Serv. Comm'n, No. 1:09-cv-17, 2009 WL 3722898 (D.N.D. Nov. 3, 2009).

Missouri Valley and the PSC each filed a motion to dismiss claiming the federal court lacks subject matter jurisdiction and that Midcontinent failed to state a claim for which relief can be granted. On September 30, 2009, Magistrate Judge Charles S. Miller, Jr. issued a Report and Recommendation and recommended the motions be denied. See Docket No. 46. Judge Miller found that Midcontinent carried its burden of proving there is federal question jurisdiction over the claims for declaratory and injunctive relief to the extent they allege the PSC misapplied the Telecommunications Act and regulations promulgated pursuant thereto. Judge Miller further found that Midcontinent's claims for injunctive and declaratory relief are not barred by administrative res judicata. On November 3, 2009, the Court adopted the Report and Recommendation in its entirety and denied the motions to dismiss. See Docket No. 53.

II. STANDARD OF REVIEW

When reviewing an agency's order, the district court applies the same standard of review as does the appellate court. Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd., 563 F.3d 743, 748 (8th Cir. 2009) (citing WWC License, L.L.C. v. Boyle, 459 F.3d 880, 889 (8th Cir. 2006)). The district court owes "no deference to the Commission's interpretations of federal law," and the review is *de novo*. WWC License, L.L.C., 459 F.3d at 889-90.

"Recognizing the state commission's 'superior technical expertise,' however, 'we review its factual determinations under the arbitrary and capricious standard.'" Qwest Corp. v. Boyle, 589 F.3d 985, 991 (8th Cir. 2009) (quoting Ace Tel. Ass'n v. Koppendrayer, 432 F.3d 876, 878 (8th Cir. 2005)). Mixed questions of law and fact are determined under the arbitrary and capricious standard as well. WWC License, L.L.C., 459 F.3d at 889. "The scope of review under the arbitrary and

capricious standard is ‘narrow’; the standard does not permit ‘a court . . . to substitute its judgment for that of the agency.’” Qwest Corp., 589 F.3d at 991 (quoting Connect Commc’ns Corp. v. Sw. Bell Tel., L.P., 467 F.3d 703, 711 (8th Cir. 2006)). This standard is the same as the substantial evidence standard. Ace Tel. Ass’n, 432 F.3d at 880. “As long as the [Commission’s] factual findings are supported by substantial evidence in the record as a whole, [the Court] will uphold those findings and the reasonable inferences that the [Commission] drew from them.” Id.

III. LEGAL DISCUSSION

Under the Telecommunications Act of 1996, telecommunications carriers must “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. § 251(a)(1). One additional duty imposed on a local exchange carrier is that it must offer its services to competitors for resale and not impose unreasonable or discriminatory conditions or limitations. Id. § 251(b)(1). Under the Telecommunications Act, Missouri Valley is an incumbent local exchange carrier and Midcontinent is a competitive local exchange carrier. An incumbent local exchange carrier has several obligations in addition to the duties imposed on all local exchange carriers. These additional duties are as follows:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network –

- (A) for the transmission and routing of telephone exchange service and exchange access;
- (B) at any technically feasible point within the carrier's network;
- (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
- (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty –

- (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
- (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

47 U.S.C. § 251(c).

W. Thomas Simmons, Midcontinent's Senior Vice President of Public Policy, testified that Midcontinent's request to Missouri Valley included negotiation in good faith, interconnection at any technically feasible point, collocation, and notices of network changes. See Docket No. 43 (Testimony of W. Thomas Simmons on Behalf of Midcontinent Communications, July 2, 2008, p. 7). The request did not include access to unbundled network elements or wholesale resale. Simmons testified there is no need for access to unbundled network elements because Midcontinent intends to serve its customers using its own network facilities, and Midcontinent has obtained wholesale resale from Missouri Valley. See Docket No. 43 (Testimony of W. Thomas Simmons on Behalf of Midcontinent Communications, July 2, 2008, pp. 7-8).

In recognizing that some incumbent local exchange carriers serving rural areas face special economic and technical challenges due to the smaller and more dispersed populations they serve, Congress included a rural exemption under the Telecommunications Act. The exemption states, in part:

Subsection (c) of this section shall not apply to a rural telephone company until (I) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title

47 U.S.C. § 251(f)(1)(A). The Act also allows for suspension and modifications of duties for rural telephone companies:

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification --

(A) is necessary –

(I) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

. . . .

47 U.S.C. § 251(f)(2).

It is undisputed that Missouri Valley is a rural telephone company as defined under the Telecommunications Act and applicable Federal Communications Commission (FCC) rules, and that Midcontinent made a bona fide request for interconnection. The PSC denied Midcontinent's petition to terminate Missouri Valley's rural exemption because it found the request for interconnection

would unduly economically burden Missouri Valley and impair its universal service efforts. See Docket No. 34-4.

A. WAIVER OF RURAL EXEMPTION

Midcontinent contends the PSC violated federal law by not providing a reasoned explanation for rejecting Midcontinent's argument that Missouri Valley had waived its rural exemption under the Telecommunications Act. Missouri Valley argues that while the PSC's Order did not specifically discuss the waiver claim, the PSC did address and reject the position taken by Midcontinent and, more important, there is no evidence in the record to support Midcontinent's claim. The PSC argues that it considered the waiver of rural exemption theory before conducting its primary inquiry of determining whether to terminate Missouri Valley's rural exemption.

“‘If the agency itself has not provided a reasoned basis for its action, the court may not supply one.’” Sw. Bell Tel. Co. v. FCC, 153 F.3d 523, 549 (8th Cir. 1998) (quoting Downer v. United States, 97 F.3d 999, 1002 (8th Cir. 1996)). “The agency must ‘examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’” Qwest Corp., 589 F.3d at 998 (quoting Connect Commc’ns Corp., 467 F.3d at 711). Courts cannot accept an agency’s “‘post hoc rationalizations for [its] action.’” However, there is no requirement that every detail of the agency’s decision be stated expressly in the [order].” In re Operation of Mo. River Sys. Litig., 421 F.3d 618, 634 (8th Cir. 2005) (quoting Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983)). All that is required is that the rationale be present in the administrative record. In re Operation of Mo.

River Sys. Litig., 421 F.3d at 634; see South Dakota v. U.S. Dep’t of the Interior, 423 F.3d 790, 801 (8th Cir. 2005) (precise explanations that respond to every contention are not required).

The Court finds that the PSC did consider the waiver of rural exemption argument propounded by Midcontinent. The preliminary statement of the PSC’s Order acknowledged Midcontinent’s rural exemption argument. See Docket No. 34-4. The issue was briefed to the PSC in depth and addressed at the administrative hearing. Following the hearing, the commissioners were provided a memorandum prepared by a PSC staff member that summarized each of the parties’ arguments concerning the waiver of the rural exemption. See Docket No. 34-3. The record reveals that the parties submitted extensive post-hearing briefs, and proposed findings of fact and conclusions of law, which specifically addressed the issue. See Docket No’s. 10-1, 10-2, 10-3, and 10-4. A careful review of the entire administrative record clearly reveals that the subject of whether Missouri Valley had waived its rural exemption was addressed at length at the PSC level. The Court finds that the PSC addressed the subject of whether Missouri Valley had waived its rural exemption, and the rationale for the decision of the PSC is present in the administrative record. Although the PSC’s Order is largely silent on the topic, it is obvious from a review of the entire record that the “waiver of rural exemption” theory or argument was considered and rejected by the PSC. There is no requirement that every detail of the agency’s decision be expressly stated in the order. The PSC obviously rejected Midcontinent’s theory that Missouri Valley had waived its rural exemption.

Having determined that the PSC considered the “waiver of rural exemption” argument, the Court must determine whether the PSC acted arbitrarily or capriciously in denying Midcontinent’s request for a determination of waiver. See Renfro v. Swift Echrick, Inc., 53 F.3d 1460, 1464 (8th Cir. 1995) Midcontinent contends that Missouri Valley waived the right to rely on the rural

exemption on two different occasions: (1) when Missouri Valley first acquired the Williston exchange in 2002-2003, and (2) in 2004 when Missouri Valley entered into a resale agreement with Midcontinent.

In March 1999, Midcontinent and US West executed an interconnection agreement which provided for facilities-based interconnection in the Williston exchange. See Docket No. 30-8. US West sold the Williston exchange to Citizens Communications and it agreed to assume obligations under the existing agreements. A letter from Citizens Communications, dated February 3, 2003, stated it was selling the Williston exchange to Missouri Valley. The letter went on to state, in part:

The Buyers(s) [including Missouri Valley] have been made aware of existing Interconnection Agreement(s) and have agreed to negotiate new agreements with carriers that have ongoing interconnection activities related to the exchanges they purchase. If the Buyer(s) have not completed negotiations or the North Dakota Public Service Commission has not approved the new negotiated agreement at the time of purchase, the Buyer(s) will offer to provide interconnection under the existing agreement until new agreements can be completed.

See Docket No. 30-8, p. 14.

In a letter from Missouri Valley to Midcontinent dated March 27, 2003, Missouri Valley writes that it “will honor the current Interconnection Agreement that is in place between Citizens and Midcontinent Communications until a new Agreement can be negotiated.” See Docket No. 30-8, p. 18. Missouri Valley’s counsel sent another letter to Midcontinent, dated November 4, 2003, that states, in part:

This letter constitutes formal notice of the exercise of [Missouri Valley] of Section 3.1 termination provisions of the interconnection agreement between Citizens and [Midcontinent]. Missouri Valley agreed to honor the terms of this agreement in correspondence to you dated March 27, 2003.

The terms of Section 3.1 provide that either Party to the agreement may provide written notice to the other Party at least 90 days in advance of the specified

date of termination. Missouri Valley hereby specifies a date of termination of February 6, 2004.

. . .

Missouri Valley will be preparing a standard interconnection agreement as soon as practicable and will forward that agreement to Midcontinent to serve as a starting point for negotiations.

See Docket No. 30-8, pp. 20-21. Midcontinent argues that since the letter failed to indicate that Missouri Valley would not continue to make § 251(c) interconnection available to Midcontinent or that it objected to § 251(c) interconnection, Missouri Valley waived its rural exemption.

In November 2004, Midcontinent and Missouri Valley entered into a “Resale Agreement.” See Docket No. 30-9.² The agreement states, “This Agreement constitutes the entire agreement between [Missouri Valley] and Midcontinent and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.” See Docket No. 30-9, p. 13. Simmons testified the resale agreement “was a replacement for the agreement that had been in place between Midcontinent and Citizens Telephone prior to the sale of the Williston exchange to Missouri Valley’s current parent, Nemont.” See Docket No. 43 (Testimony of W. Thomas Simmons on Behalf of Midcontinent Communications, July 2, 2008, p. 8).

² The document titled “Resale Agreement,” but referred to as “Interconnection Agreement” by Midcontinent, was filed as an attachment to Midcontinent’s memorandum in support of its motion for partial summary judgment. See Docket No. 30-9. Missouri Valley contends this was not part of the evidentiary record before the PSC. Midcontinent argues that while it was not part of the record, it is a matter of public record and both Midcontinent and Missouri Valley referred to the terms of the agreement in their briefs. The Eighth Circuit Court of Appeals has held that courts may rely on matters within the public record. See Elnashar v. U.S. Dep’t of Justice, 446 F.3d 792 (8th Cir. 2006) (holding that the district court may look to public records that are not contradictory to the complaint in deciding a motion for judgment on the pleadings).

Midcontinent argues that by entering into the resale agreement, Missouri Valley waived the rural exemption for all 47 U.S.C. § 251(c) obligations, including interconnection. Missouri Valley contends that Midcontinent’s waiver arguments are not recognized by the Telecommunications Act, federal case law, or PSC precedent construing the Act. The Court agrees.

The Telecommunications Act states that § 251(c) “shall not apply to a rural telephone company until (I) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title . . .” 47 U.S.C. § 251(f)(1)(A) (emphasis added). While the resale agreement subjects Missouri Valley to the duty of resale under § 251(c) of the Act, it does not mention interconnection. The Telecommunications Act does not state that once a rural company subjects itself to one of the obligations under § 251(c), it has waived the rural exemption for all § 251(c) obligations.

The Court finds the PSC’s rejection of Midcontinent’s waiver of rural exemption claim was neither arbitrary nor capricious. When Missouri Valley first acquired the Williston exchange, it assumed the interconnection agreement Midcontinent had in place with Citizens Communications until a new agreement could be negotiated. See Docket No. 30-8, pp. 14, 18. A new agreement was negotiated in 2004, titled “Resale Agreement” which “supersede[d] all prior oral or written agreements.” See Docket No. 30-9, p. 13. The PSC was not arbitrary or capricious in its determination based on the evidence presented.

B. FACTORS FOR CONSIDERATION TO TERMINATE THE RURAL EXEMPTION

Midcontinent contends that even if Missouri Valley did not waive the rural exemption, the exemption as to Missouri Valley must be lifted/terminated under federal law. Under 47 U.S.C. § 251(f) of the Telecommunications Act, Missouri Valley is exempt from the requirement to provide services requested under § 251(c) until the PSC determines that Midcontinent's bona fide request 1) is not unduly economically burdensome, 2) is technically feasible, and 3) is consistent with the provisions of § 254 regarding universal service. The parties agree that interconnection would be technically feasible. Midcontinent bears the burden of proving that interconnection would not be unduly economically burdensome or harmful to universal service in the market to justify the termination of the otherwise continuing rural exemption. Iowa Utils. Bd. v. FCC, 219 F.3d 744, 762 (8th Cir. 2000), *vacated in part on other grounds by* Iowa Utils Bd. v. FCC, 301 F.3d 957 (8th Cir. 2002).

In a 2-1 decision, the PSC concluded that Midcontinent had failed to sustain its burden to prove that its request for interconnection was not unduly economically burdensome and consistent with the provisions of § 254 regarding universal service. See Docket No. 34-4. The PSC ordered that the rural exemption for interconnection in Missouri Valley's Williston exchange not be terminated. See Docket No. 34-4. In a dissent, Commissioner Susan E. Wefald said she disagreed with a number of the factual findings regarding the economic impact that would be imposed upon Missouri Valley if the rural exemption was terminated. Commissioner Wefald's preference was to terminate the rural exemption and require a suspension until such time as Midcontinent met the requirements of a designated eligible communications carrier, which she said would then require Midcontinent to serve the entire service area and not just the city of Williston, just as Missouri Valley does now. See Docket No. 34-4, p. 11.

1) UNDUE ECONOMIC BURDEN

Midcontinent contends the PSC fundamentally erred in interpreting and applying the “unduly economically burdensome” standard. The PSC’s Rural Exemption Order states, in part:

26. The argument that Missouri Valley would be able to receive additional USF subsidies under the safety valve mechanism if Missouri Valley experiences interconnection-related line and revenue losses in the case of Midcontinent’s entry is not persuasive.

...

29. The Commission’s interpretation is guided by the opinion of the Court in *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744 (8th Cir. 2000) . . .

30. The rural exemption is not limited to protection against the most extreme economic burdens such as threats to economic survival. Even though the loss of revenue might not threaten Missouri Valley’s ability to offer existing services in the immediate future, its efficiency in offering those services would be damaged because the revenue loss would unduly impair Missouri Valley’s ability to invest in facility upgrades and replacements.

31. . . . Neither Section 251(f)(1) of the Act, 47 CFR 51.405, nor the FCC’s Local Competition Order supports a finding that the impact on the Nemont group of companies in total should be the relevant benchmark. The Commission agrees that consideration as to economic burden that the interconnection would impose must be limited to the economic burden that the interconnection would impose on Missouri Valley.

32. Midcontinent has not proven that a cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million is not unduly economically burdensome, or that a smaller financial impact is not unduly economically burdensome.

33. Midcontinent’s evidence that the economic impact is \$888,577 is not more persuasive than Missouri Valley’s evidence that the economic impact is \$3.58 million.

See Docket No. 34-4.

Shawn Hanson, the general manager for Missouri Valley and its parent company, Nemont, testified that facilities-based interconnection between Midcontinent and Missouri Valley would be unduly economically burdensome. Missouri Valley contends that if Midcontinent's request for interconnection is granted, Missouri Valley's cumulative net revenue loss is estimated at \$3.58 million over the 2009-2012 time period. Hanson testified that part of the revenue loss would be from Midcontinent no longer buying lines from Missouri Valley for resale to Midcontinent's customers. See Docket No. 30-2, p. 15. Hanson determined that if interconnection is ordered, Missouri Valley's present and future revenues would be reduced without a material reduction in operating costs. See Docket No. 30-2, pp. 23, 26. Hanson said this would result in an increase of Missouri Valley's costs per customer. While the loss of revenue would not damage Missouri Valley's ability to continue to offer service in the near future, Missouri Valley's efficiency in offering those services would be damaged. Missouri Valley's ability to invest in new facilities would also be immediately curtailed and damaged. See Docket No. 30-2, p. 28.

In estimating the net revenue losses, Hanson testified that Missouri Valley used known historical facts to project the losses into the future. Hanson said this is the same basic approach Midcontinent used when it sought interconnection with the North Dakota Telephone Company a few years prior. See Docket No. 30-2, p. 25. Hanson said Missouri Valley's plans beyond 2009 "have basically been put on hold by the magnitude of the impact that this interconnection request would have on [Missouri Valley]. In that respect it is already beginning to have the detrimental impact of reliability, sufficiency, and adequacy of allowing us to plan for meeting our universal service compliance obligations." See Docket No. 30-2, p. 29. Hanson said interconnection with

Midcontinent would also cause loss of revenues to support facilities upgrades and replacements. See Docket No. 30-2, p. 30.

Scott C. Lundquist, a consultant and expert witness for Midcontinent, provided testimony which assessed and refuted the economic impact analysis supplied by Shawn Hanson. Lundquist made several adjustments to Hanson's analysis in the areas of migration timing, annual line growth factors, special access revenues, and universal service fund revenues. See Docket No. 30-13, p. 5. Lundquist found Hanson's analysis for migration timing was over-represented by \$154,300. Lundquist testified that Hanson's analysis applies unreasonably high annual line growth factors for Midcontinent's resold local exchange services, and that Hanson used over-simplified formulas instead of the standard formula appropriate for those determinations. See Docket No. 30-13, p. 14. Lundquist estimated the difference to be \$572,600 for annual line growth factors. See Docket No. 30-13, p. 18. Lundquist said special access revenues are completely irrelevant to whether or not Midcontinent obtains its requested § 251(c) interconnection with Missouri Valley because Midcontinent could choose to offer special access services now in competition with Missouri Valley, which is a difference of \$367,600. See Docket No. 30-13, p. 20.

The biggest estimated difference Lundquist found in his economic analysis as compared to Missouri Valley's expert (Shawn Hanson) is that Lundquist believed Missouri Valley may be eligible for federal "safety valve" financing from the universal service fund while Hanson did not hold that same opinion. "Safety valve" financing is the term used when a company will receive an increase in federal universal service fund subsidies if its per line cost increases. Lundquist had calculated this cost difference to be \$2.23 million. See Docket No. 30-13, p. 28. Lundquist projected the

cumulative net revenue loss to Missouri Valley over the 2009-2012 time frame to be \$888,577 which is a reduction of 75% of Hanson's estimated loss of \$3.58 million. See Docket No. 30-13, pp. 6, 31.

Midcontinent contends the PSC incorrectly determined that Missouri Valley would not be eligible for federal "safety valve" financing from the universal service fund. Lundquist testified that Missouri Valley could receive additional federal universal service fund revenues if it would experience revenue losses because of interconnection. On the other hand, general manager Shawn Hanson said Missouri Valley is not eligible for "safety valve" financing because of the "parent trap" rule, which limits a rural telephone company's receipt of universal service fund revenues for an acquired exchange that was not historically qualified under the rules. See Docket No. 30-2, p. 5. Since Citizens Communications was not qualified for "safety valve" support in the Williston exchange, Missouri Valley is limited to receive it only for new investments made after Midcontinent would come into the area, not to replace lost revenues. Whether Missouri Valley would be entitled to "safety valve" subsidies is arguably a mixed question of fact and law which essentially becomes an issue of witness credibility. See Chen v. Mukasey, 510 F.3d 797, 801 (8th Cir. 2007) ("Credibility determinations are considered to be the special province of the finder of fact").

Timothy J. Gates, senior vice president of a consulting firm and another expert witness retained by Midcontinent, testified that "unduly economically burdensome" refers to costs that would impose an excessively heavy burden on the incumbent local exchange carrier, compared to the costs that it would experience if the request for interconnection were not granted. See Docket No. 30-5, p. 40. Gates testified that Midcontinent intends to pay for the services it obtains from Missouri Valley and will pay for and maintain the interconnection facilities on its side of the interconnection point. Gates testified that Lundquist's estimated cumulative net revenue loss of \$888,577 would not

be unduly economically burdensome. Gates did not testify as to whether any larger amounts would be unduly economically burdensome.

Midcontinent argues that Shawn Hanson's economic analysis does not show an undue economic burden because it relied on the costs of competition Missouri Valley would be required to shoulder regardless of whether it provided interconnection with Midcontinent. However, the Eighth Circuit Court of Appeals has held that economic burdens ordinarily associated with competitive entry may be considered when determining whether the request was unduly economically burdensome:

If Congress had wanted the state commissions to consider only that economic burden which is in excess of the burden ordinarily imposed on a small or rural [incumbent local exchange carrier] by a competitor's requested efficient entry, it could easily have said so. Instead, its chosen language looks to the whole of the economic burden the request imposes, not just a discrete part.

Iowa Utils. Bd. v. FCC, 219 F.3d 744, 761 (8th Cir. 2000), *vacated in part on other grounds by Iowa Utils Bd. v. FCC*, 301 F.3d 957 (8th Cir. 2002); see Wireless World, L.L.C. v. Virgin Islands Pub. Servs. Comm'n, No. Civ.A.02-0061STT, 2008 WL 5635107, at *5 (D.V.I. Feb. 28, 2008) (unpublished) (finding that competition costs can be used in determining whether interconnection would be unduly economically burdensome).

Midcontinent also argues the PSC should have considered Missouri Valley's parent company, Nemont, in determining whether an undue economic burden exists. Expert Timothy Gates for Midcontinent testified it is misleading to suggest that Missouri Valley is a stand-alone entity. See Docket No. 30-5, p. 34. Missouri Valley is a wholly-owned subsidiary of Nemont, and Shawn Hanson is the general manager for all of the Nemont companies. Nemont and Missouri Valley share many operating resources and employees and present a unified face to the public. All services

through Missouri Valley are offered under the Nemont name and they share a website. Missouri Valley files consolidated income tax returns with Nemont, and Nemont holds all the outstanding common stock of Missouri Valley. See Docket No. 30-6, pp. 9, 13. Nemont provides management and employee services for Missouri Valley which Missouri Valley pays for on a monthly basis, and Missouri Valley does business with its Nemont affiliates. See Docket No. 30-6, p. 14.

Missouri Valley contends that Nemont should not be included in the economic analysis and the PSC agreed. Midcontinent's request for interconnection is addressed to Missouri Valley, not Nemont. Missouri Valley contends that Nemont is its "affiliate," and argues the Telecommunications Act does not direct the PSC to consider whether the proposed interconnection would be unduly economically burdensome on the rural telephone company and its affiliate.

The Court notes that nothing in the Telecommunications Act of 1996, or the applicable FCC regulations, requires the PSC to include a rural telephone company's parent or affiliate in determining whether the request for interconnection is unduly economically burdensome. The PSC found that Midcontinent had not met its burden of proof concerning its proposed adjustments to the economic impact on Missouri Valley. A review of the entire record reveals the PSC provided a reasoned basis for determining that interconnection would cause Missouri Valley to suffer an undue economic burden. This Court may not substitute its judgment for that of the agency, and it must give substantial deference to the agency's technical expertise and factual determinations. See Downer, 97 F.3d at 1002 (citing Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43). The Court finds, as a matter of law, that the PSC's finding that interconnection would cause Missouri Valley to suffer an undue economic burden is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. That finding is supported by substantial evidence in the record as a whole. Midcontinent bears the

burden of proving that interconnection would not be unduly economically burdensome. There is substantial evidence in the record to support the PSC's decision that Midcontinent had failed to sustain the burden of proof on this issue.

2) UNIVERSAL SERVICE

In order to terminate Missouri Valley's rural exemption, Midcontinent is required to show that its requested interconnection is consistent with 47 U.S.C. § 254. Section 254 lists seven "universal service principles" to serve as guideposts for regulatory efforts under the Telecommunications Act:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

47 U.S.C. § 254(b). The PSC found that Midcontinent had not sustained its burden of proof that its requested interconnection would be consistent with 47 U.S.C. § 254 regarding universal service. See Docket No. 34-4.

General manager Shawn Hanson testified that Missouri Valley's revenues would be decreased with interconnection which would impair Missouri Valley's ability to perform its universal service obligations. See Docket No. 30-2, p. 33. Hanson believes that universal service obligations are going to expand to include broadband speed access to the internet which would require Missouri Valley to invest additional funds and make it more difficult for Missouri Valley if interconnection is allowed. See Docket No. 30-2, p. 37.

Missouri Valley currently receives support from revenues received from the federal Lifeline and Link-up programs. See Docket No. 30-2, p. 34. Lifeline and Link-up are programs that subsidize low income telephone consumers so that consumers pay reduced charges for basic telephone service, and the federal universal service program reimburses Missouri Valley for the

Lifeline discounts. Hanson testified that interconnection would negatively impact Missouri Valley's ability to continue to offer the \$3.50 monthly discount it currently offers to Lifeline consumers. See Docket No. 30-2, p. 36. The federal program would then not pay the matching \$1.75 amount, which could result in low income consumers' monthly bills increasing by \$5.25. According to Hanson, Midcontinent does not yet qualify to participate in the Lifeline program. However, in its answers to interrogatories dated May 8, 2008, Midcontinent stated that it serves twenty-one low income, Lifeline, and Link-Up customers in Williston. See Docket No. 43. Hanson also testified that Midcontinent's facilities and its target market area are in Williston only, while Missouri Valley has the responsibility to provide service to all consumers in the Williston exchange area. See Docket No. 30-2, pp. 38-39.

Timothy Gates testified that Midcontinent's facilities-based entry into the Williston area will not harm the availability or quality of services, including access to advanced telecommunications services. Instead, Midcontinent's entry will likely result in healthy competition which should ultimately reduce rates and increase quality and diversity of service for consumers in Williston. See Docket No. 30-5, pp. 25-26. Gates also testified that Missouri Valley can consider and perhaps deploy new offerings, improve quality of service, engage in cost-reduction activities, and plan for long-run network improvement in the time it will take for negotiations with Midcontinent and Midcontinent to begin moving customers from resale to its own facilities. See Docket No. 30-5, p. 27.

Midcontinent contends the PSC misapplied the standard for determining whether a requested interconnection agreement would impair universal service. Midcontinent partially bases its argument regarding universal service on the same arguments it made regarding the unduly economically

burdensome standard – that Missouri Valley would be eligible for “safety valve” financing and the PSC should have considered Nemont’s financial status in its decision. Those arguments fail for the same reasons stated above.

Midcontinent contends that even if interconnection would be unduly economically burdensome, that is insufficient to find that Missouri Valley’s ability to provide Lifeline service to remote rural areas around Williston would be threatened as a result of interconnection. Midcontinent argues the PSC erred by accepting Hanson’s speculation that regulatory changes to the universal service fund rules may require Missouri Valley to invest additional funds to satisfy new broadband requirements. Midcontinent argues the most current FCC proposal for broadband services merely creates funding to support broadband and does not include mandatory deployment. Midcontinent asserts the PSC has the authority to require Midcontinent to become an eligible telecommunications carrier, with the specific obligation to provide Lifeline services, prior to authorizing interconnection. See 47 U.S.C. § 253(f).

The Court finds, as a matter of law, that the PSC’s determination that interconnection would adversely affect Missouri Valley’s ability to provide universal service is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The Court finds the PSC’s factual findings are supported by substantial evidence in the record as a whole. Midcontinent bears the burden of proof and there is substantial evidence in the record to support the PSC’s decision that Midcontinent failed to sustain that burden on the issue of whether interconnection would be harmful to universal service in the market. The Court upholds the PSC’s denial of Midcontinent’s request to terminate Missouri Valley’s rural exemption.

Midcontinent's complaint also seeks damages and attorney's fees from Missouri Valley caused by Missouri Valley's denial of Midcontinent's request for interconnection. Missouri Valley seeks a dismissal of Midcontinent's claim for damages as a matter of law. The Telecommunications Act authorizes an action for damages and attorney's fees:

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequences of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee

47 U.S.C. § 206. A rural telephone company is exempt from § 251(c) obligations "until" the PSC orders the rural exemption be terminated. The PSC ordered that the exemption not be terminated, so Missouri Valley was exempt from § 251(c) obligations. Since the Court has upheld the PSC's decision not to terminate the rural exemption, the Court finds as a matter of law that Midcontinent's claim for damages and attorney's fees pursuant to 47 U.S.C. § 206 is moot.

IV. CONCLUSION

The Court finds that the PSC's Order of October 8, 2008, is neither arbitrary, capricious, an abuse of discretion, nor otherwise contrary to law. The scope of review in this proceeding is narrow and deference is to be given to the agency's technical expertise. The PSC's factual findings, and the reasonable inferences to be drawn from such findings, are supported by substantial evidence in the entire record. Accordingly, the Court **DENIES** Midcontinent's motions for partial summary judgment (Docket No. 29) and permanent injunction (Docket No. 33), and **GRANTS** Missouri Valley's motion for summary judgment (Docket No. 36).

IT IS SO ORDERED.

Dated this 15th day of April, 2010.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge
United States District Court